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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 58

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

S. C. THOMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 25, 1940
CERTIORARI GRANTED MAY 20, 1940

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 58

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

S. C. THOMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 91308

S. C. THOMSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Petitioner: T. F. Davies Haines, Esq. For Respondent: J. C. Maddox, Esq.

1937

Nov. 13—Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 13—Copy of petition served on General Counsel.

Dec. 14—Answer filed by General Counsel.

Dec. 21—Notice issued placing proceeding on New York City Calendar. Copy of answer served on taxpayer.

1938

Oct. 25—Hearing set beginning Nov. 28, 1938, in New York City.

Nov. 28—Hearing had before Mr. Murdock on the merits. Proceeding submitted on stipulation of facts. Stipulation of facts filed. Taxpayer's brief due Dec. 28, 1938. Respondent's brief due Jan. 27, 1939. Taxpayer's reply due Feb. 11, 1939.

Dec. 12—Transcript of hearing 11/28/38 filed.

Dec. 17—Notice of appearance of Allen G. Gartner as counsel for taxpayer filed.

2 Dec. 21—Brief filed by taxpayer. 12/21/38 copy served.

1939

Jan. 27—Brief filed by General Counsel.

Feb. 10—Reply brief filed by taxpayer. 2/10/39 copy served.

June 7—Opinion rendered—John E. Murdock, Division 3. Decision will be entered for the respondent.

June 14—Decision entered—J. E. Murdock, Division 3.

June 26—Motion for reconsideration and amendment of findings of fact filed by taxpayer.

June 28—Motion denied.

Aug. 5—Notice of the withdrawal of Allen G. Gartner filed.

Aug. 9—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Aug. 9—Proof of service filed.

Aug. 9—Notice of the appearance of T. F. Davies Haines as counsel filed.

1939

Aug. 9—Notice of the withdrawal of E. I. Sproull as counsel filed.
Aug. 12—Praecipe for record filed by taxpayer with proof of service thereon.

3 Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed Nov. 13, 1937

The above named petitioner hereby petitions for a reduction for a redetermination of the deficiency set forth by the respondent in his notice of deficiency, symbols IT:A:1-GCF:90D, dated October 6, 1937, and as a basis of this proceeding alleges as follows:

1. The petitioner is an individual residing at 2 E. 61st Street, New York, New York.

2. The notice of deficiency (copy of which is attached and marked Exhibit "A") was mailed on or about October 6, 1937.

3. The taxes in controversy are income taxes for the calendar year 1934, and in the amount of $4,641.02.

4. The petitioner alleges the following errors made by the respondent in the determination of tax set forth in said notice of deficiency:

(a) The respondent erred in disallowing a deduction for bad debts of $24,625.00, represening the difference between the cost of bonds of New York United Hotels, Incorporated, and the amount received in settlement pursuant to court order.

5. The petitioner sets forth the following facts upon which he relies as the basis of this proceeding:

4 (a-1) On May 25, 1927, the petitioner purchased bonds of the New York United Hotels, Inc., 6% due February 1, 1947, and having a par value of $25,000.00, at a cost of $24,750.00.

(a-2) Due to the insolvency of the company, receivership proceedings were instituted in the United States District Court for the Southern District of New York.

(a-3) As a result of the reorganization of the company, and at the direction of the court, the petitioner received on or about June 23, 1934, $5.00 in full settlement of each $1,000.00 bond, or a total of $125.00.

Wherefore, the petitioner prays that the Board may hear the proceeding and find that there is no deficiency in tax due from the petitioner for the year 1934, giving and granting such other and further relief to which the petitioner may be justly and legally entitled.

(Signed) EDWARD I. SPROULL,
Edward I. Sproull,
Counsel for Petitioner,
17 East 42nd Street, New York, New York.

[*Duly sworn to by A. C. Thomson; jurat omitted in printing.*]

5 *Exhibit A to petition*

OCTOBER 6, 1937.

IT:A:1.
GCF–90D.
MR. S. C. THOMSON,
29 Broadway, New York, New York.

SIR: You are advised that the determination of your income-tax liability for the taxable year (s) ended December 31, 1934, discloses a deficiency of $4,641.02, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P–7. The signing and filing of this form will expedite the closing of your return (s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.
By (Signed) W. T. SHERWOOD,
Acting Deputy Commissioner.

Enclosures:
Statement.
Form 870.
GCF/LM–3.

6 *Statement*

IT:A:1.
GCF–90D.

In re: Mr. S. C. Thomson, 29 Broadway, New York, New York

Tax Liability for Taxable Year Ended December 31, 1934

Income tax, liability $5,025.28; assessed, $384.26; deficiency, $4,641.02.

The deficiency shown herein is based upon the report of Internal Revenue Agent Walter A. Laine, dated June 29, 1936, and upon such adjustments as are set forth herein.

Careful consideration has been accorded your protests dated September 15, 1936, and April 5, 1937, in connection with the findings of the examining officer, and the information submitted at conferences

held in the office of the Internal Revenue agent in charge, and in this office.

As a result of your protest and the above-mentioned conferences, dividends have been decreased by $157.13. However, your contention with respect to the New York United Hotels, Incorporated, loss has not been conceded.

Net income reported	$12,140.78
Add: 1. Loss disallowed	24,625.00
Total	36,765.78
7 Deduct: 2. Dividends decreased	157.13
Net income adjusted	$36,608.65

Explanation of Changes

1. The loss of $24,625.00 represents the difference between the cost of New York United Hotels, Incorporated, bonds in the amount of $24,750.00 and the amount of $125.00 received in settlement therefor. This transaction is considered as an exchange under the provision of section 117 (f) of the Revenue Act of 1934, subject to the limitations imposed by that section. Since other transactions in securities result in a loss in excess of $2,000.00 no amount is allowed with respect to the aforementioned bonds.

2. Dividends have been decreased by $157.13 representing the non-taxable portions of dividends paid by Kennecott Copper Corporation and New Jersey Zinc Corporation.

Computation of Tax

Net Income adjusted		$36,608.65
Less:		
Dividends	$17,696.97	
Earned income credit on $3,000.00	300.00	17,996.97
Income subject to normal tax		$18,611.68
Normal tax at 4% on $18,611.68		744.47
Surtax on $36,608.65		4,347.81
Total Tax		$5,092.28
8 Less: Tax paid at source		67.00
Income tax liability		$5,025.28
Income tax assessed: Account #812847		364.26
Deficiency		$4,661.02

A copy of this letter has been mailed to your representative, Mr. Edward I. Sproull, 17 East 42nd Street, New York, New York, in accordance with the authority contained in the power of attorney on file with the Bureau.

GCF/Lm-3.

Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed Dec. 14, 1937

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.
2. Admits the allegations contained in Paragraph 2 of the petition.
3. Admits the allegations contained in Paragraph 3 of the petition.
4–(a). Denies that the respondent erred as alleged in Paragraph 4–(a) of the petition.
5. Denies the allegations of fact contained in Paragraph 5 of the petition and all sub-paragraphs thereof.
6. Denies generally and specifically each and every allegation contained in the petition and not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CHESTER A. GWINN,
ARTHUR W. CARNDUFF,
Special Attorneys,
Bureau of Internal Revenue.

10 Before United States Board of Tax Appeals

S. C. THOMSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 91308. Promulgated June 7, 1939

Where the receivers of a corporation, pursuant to a court order in the receivership proceedings, paid to the debenture holders who surrendered their debentures before a fixed time a nominal sum in full payment and settlement of the debentures, there was a "retirement" of the debentures within the meaning of that word as used by Congress in section 117 (f) of the Revenue Act of 1934.

E. I. Sproull, C. P. A., for the petitioner.
James C. Maddox, Esq., for the respondent.

Opinion

MURDOCK: The Commissioner determined a deficiency of $4,641.02 in the income tax of the petitioner for the calendar year 1934. The only issue for decision by the Board is whether a loss of $24,625 is a capital loss, as determined by the Commissioner, or whether it was deductible in 1934 as a bad debt. The Board adopts as its findings of fact the stipulation filed by the parties.

The petitioner purchased $25,000 face amount of 20-year 6 per cent sinking-fund, gold debentures of the New York United Hotels, Inc., maturing February 1, 1947. He purchased the bonds in May 1927 at a cost of $24,750. The bonds were subject to redemption by the debtor at any time after notice of 30 days, but if they were redeemed before maturity, they had to be redeemed at a premium.

11 The debtor encountered financial difficulties beginning in 1931 and the bondholders at that time waived a portion of the interest on the bonds. Ancillary receivers were appointed by a Federal court on December 15, 1933, at which time a plan to reorganize the debtor corporation was submitted to the court. The plan proposed a sale of the assets of the corporation to a new corporation and permitted the debenture holders to purchase for cash debentures to be issued by the new corporation upon certain terms. A supplemental plan was submitted to the court in February 1934 making minor changes in the original plan. The court, on March 8, 1934, entered an order approving the plan, but under that plan there was no provision for debenture holders who did not participate in the plan of reorganization. The court entered its final order on May 22, 1934, under which the receivers were directed, inter alia, to pay to debenture holders who would surrender their debentures with all coupons attached before a fixed time, $5 for each $1,000 face amount. The petitioner received a written notice pursuant to the order of the court of May 22, 1934, which stated that the debtor corporation's assets had been sold and that he was entitled to receive $5 for each $1,000 face amount of his debentures upon surrender of the debentures, with all interest coupons attached, on or before August 20, 1934. Payment of $5 was to be "in full payment and settlement of said debentures." The petitioner surrendered his debentures on June 22, 1934, and received $125 in cash for them.

The Commissioner, in determining the deficiency, allowed the deduction of losses from sales or exchanges of capital assets arising from transactions, other than the one involved in these bonds, in an amount which exceeded the gains from such sales or exchanges by at least $2,000.

Section 117 (d) of the Revenue Act of 1934 provides that losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges.

12 Thus, if the Commissioner was correct in determining that the petitioner's loss from the disposition of the bonds was a capital loss, the loss will not benefit the petitioner for income tax

purposes. The petitioner, therefore, seeks to have this loss allowed as a bad debt under section 23 (k). The petitioner kept no books, but made his return upon a cash basis and claimed the loss in question as a bad debt on his return for 1934. Bonds are evidences of debt and such debts may give rise to a deduction under section 23 (k). Samuel Bird, 4 B. T. A. 259; Merrill Trust Co., 21 B. T. A. 1395; Carl P. Dennett, 30 B. T. A. 49; Commonwealth Federal Savings Bank v. Lucas, 41 Fed. (2d) 111; Kitselman v. Commissioner, 89 Fed. (2d) 458; certiorari denied, 302 U. S. 709; Pacific National Bank of Seattle v. Commissioner, 91 Fed. (2d) 103. The Commissioner contends, however, that section 117 (f) is controlling. That provision, which appeared for the first time in the Revenue Act of 1934, is as follows:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * * * *

(f) Retirement of Bonds, Etc.—For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

The petitioner argues that the provision is not applicable because the word "retirement" was intended to mean redemption at maturity, or at some earlier time, in accordance with the terms of the debentures, and was not intended to include such a forced surrender of the bonds as occurred in this case for a nominal amount in obvious violation of the redemption provisions of the bonds.

13 The word "retirement" is not defined in the statute. It is susceptible of various meanings. Among the meanings given in Webster's New International Dictionary are these: "To withdraw from circulation or from the market, to take up or pay, as to retire bonds, or retire a note." The same authority defines "redeem" as meaning "to pay back, to recover the obligation of, or to fulfill as a promise." No case has come to our attention where a court has considered the possible distinction, from the standpoint of retirement, between a forced surrender of bonds for an amount less than that provided in the debentures, as opposed to a redemption of bonds for full value in accordance with the provisions of the bonds governing redemption. Although the provisions of section 117 (f) clearly apply where bonds have been retired in accordance with their redemption provisions (cf. Fairbanks v. United States —U. S.— [3/27/39]), there may be room for doubt as to whether the provisions apply when bondholders are forced to surrender their bonds for less than the redemption figure.

The legislative history of the provision has been examined in an effort to discover the intent of Congress. The capital gain and loss provisions first appeared in the Revenue Act of 1921. A capital

gain or loss was defined in that statute, and also in later statutes, as the gain or loss resulting from the "sale or exchange" of capital assets. The question of whether the redemption of a capital asset bond was a sale or exchange had arisen. There are decisions holding that it is not a sale or exchange. Fairbanks v. United States, supra; Arthur E. Braun, Trustee, 29 B. T. A. 1161; John H. Watson, Jr., 27 B. T. A. 463. The effect of such holdings in the case of a loss might be favorable to the Commissioner, but the effect in the case of a gain might be favorable to the taxpayer. The first suggestions to Congress for eliminating uncertainty on this subject were presented in the hearings before the Committee on Ways and Means while it was considering the Revenue Bill of 1928.

14 Recommendations were made to that committee that capital gain and loss in the Revenue Bill of 1928 should be defined as including any gain or loss resulting from "redemption or retirement of corporate securities." A suggestion from another source was that the term "sale" should be defined to include all transactions resulting in taxable gain or loss. The purpose was to avoid confusion and prevent litigation. A brief submitted to the Finance Committee during the hearings on the Revenue Bill of 1928 also recommended that the capital gain and loss provisions be clarified to show that gain or loss from the "redemption or retirement of corporate securities constitutes 'capital gain.'" The argument was that if corporate securities had been held for more than two years, the tax result should be the same whether they were sold, retired, or redeemed. Congress did not adopt the suggestions for the purpose of the Revenue Act of 1928.

This same subject was brought to the attention of the Committee on Ways and Means considering the Revenue Bill of 1934, and again the contention was made that the question ought to be settled by a clarifying provision. The suggestion was that capital gain or loss be defined as resulting from the "sale, exchange, or redemption of capital assets." The only reference to this subject in the Committee reports is the following from the report of the Ways and Means Committee: "Subsection (f) provides that amounts received upon the retirement of corporate bonds and similar evidences of indebtedness shall be considered as amounts received in exchange therefor." Congress has not disclosed why it did not use the suggested word "redemption" but selected instead the word "retirement."

The word "retirement" as applied to evidences of indebtedness has a somewhat broader meaning than the word "redemption." Retirement is generally understood as meaning to withdraw from circulation not necessarily in accordance with the redemption pro-

15 visions of the bonds, whereas redemption is generally understood to mean a retirement in fulfillment of or in accordance with the provisions for redemption contained in the indenture. Thus, the selection by Congress of the word "retirement" and the rejection of the word "redemption" would seem to indicate an intent on the

part of Congress to give breadth to subsection (f). The suggestions to Congress for a change were prompted by a desire on the part of the Bar for an end to uncertainty and the resulting litigation, and Congress, in enacting the legislation, was apparently attempting to bring about the desired result. That desired result could be best accomplished by including in capital gains and losses, gains and losses from all transactions in bonds giving rise to taxable gain or loss. It seems reasonable to believe that Congress intended the word "retirement" to have its broadest meaning. An inference might be drawn from the evidence in the present case that the bondholders had lost all of their equity in the property of the debtor and the $5 was given to them as a sop. If that was not the situation, another inference would be that they were practically forced to surrender their bonds. Certainly, they did not have much choice in the matter. An argument, not without force, is that the statute should not be interpreted as applying in case of a forced surrender or in case of a mere nominal payment in discharge of the bonds. However, it would be extremely difficult to draw any satisfactory line for the purposes of section 117 (f) short of applying the section to all retirements. The bonds in the present case were retired in the sense that they were withdrawn from circulation, taken up on behalf of the debtor, and discharged as an obligation. We hold that there was a retirement of these bonds within the meaning of that word as used by Congress in section 117 (f). The question of ascertainment of worthlessness of the debt and whether that ascertainment should have been made in an earlier year are questions which need not be considered in view of this holding.

Decision will be entered for the respondent.

16 Before United States Board of Tax Appeals, Washington

Docket No. 91308

S. C. THOMPSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the determination of the Board, as set forth in its report promulgated June 7, 1939, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1934 in the amount of $4,641.02.

Entered June 14, 1939.

[SEAL] (Signed) J. E. MURDOCK,
Member.

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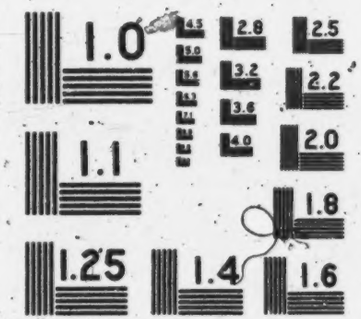

17 Before United States Board of Tax Appeals

[Title omitted.]

Petition for review

Filed Aug. 9, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

I

JURISDICTION

Petitioner Samuel C. Thomson is a citizen of the United States residing in New York City. He petitions this Court to review the decision of the United States Board of Tax Appeals entered June 14, 1939, finding a deficiency in his income tax for the calendar year 1934 in the amount of $4,641.02. The income-tax return in respect of which the foregoing tax liability arose was filed by petitioner with the Collector of Internal Revenue for the Second District of New York whose office is located in New York City and is within the jurisdiction of this Court.

18

II

NATURE OF CONTROVERSY

In 1927 petitioner purchased $25,000 face amount of New York United Hotels, Inc., 20-Year Sinking Fund Gold Debentures maturing February 1, 1947. Petitioner held these debentures until June, 1934, prior to which time the debtor corporation had gone into receivership, receivers having been appointed in December 1933. On March 8, 1934, Judge Coxe of the United States District Court, Southern District of New York, signed an order approving a reorganization plan for the debtor corporation and confirming a sale of its assets pursuant to the plan. Under the plan petitioner was entitled to purchase for cash at par debentures of a new corporation known as Hotel Roosevelt, Inc., in the ratio of $10 face value of new debentures for each $1,000 face value of the debtor's debentures, and upon such purchase he was entitled to receive in addition for each $1,000 face value of the debtor's debentures five shares of preferred stock and a voting trust certificate for five shares of common stock of the new corporation. If he did not subscribe to the new debentures but assented to the plan, he could have received upon surrender of the old debentures a voting trust certificate for common stock of the new corporation in the ratio of 2½ shares for each $1,000 debenture of the debtor. Petitioner chose neither alternative and refused his assent to the plan. On May 22, 1934, Judge Coxe signed an order

winding up the receivership. This order provided, among other things, that nonassenting debenture holders and certain general creditors of the debtor should receive from the new corporation in full satisfaction of their claims against the debtor $5.00 in cash for each $1,000 debenture of the old company or each $1,000 of allowed creditors' claims. On June 22, 1934, petitioner, pursuant to
19 the foregoing order, surrendered his debentures to Hotel Roosevelt, Inc., the new corporation, and received $125 cash.

Petitioner in his 1934 income tax return claimed, as a bad debt deduction, the sum of $24,625, which represented the difference between the cost to him in 1927 of $25,000 face value New York United Hotels, Inc., debentures and the amount he received upon the winding up of the receivership. Subsequently, on audit of the return, the Commissioner took the position, which was affirmed by the Board, that petitioner's $24,625 loss on the debentures in question did not constitute a loss arising from a bad debt but was rather a loss from sale or exchange within the meaning of Section 117 (f) of the Revenue Act of 1934. That section provides, in substance, that amounts received by the holder upon the retirement of debentures with interest coupons shall be considered as amounts received in exchange therefor. Other capital losses sustained by the petitioner in the year 1934 exceeded by more than $2,000 his capital gains for that year.

The foregoing is the primary issue on this appeal. A secondary issue is whether the Board was correct in refusing to find that petitioner sustained his loss on the foregoing debentures during the calendar year 1934.

ASSIGNMENTS OF ERROR

The Board of Tax Appeals erred:

(1) in finding that $25,000 New York United Hotels, Inc., 6% debentures owned by petitioner and surrendered by him to Roosevelt Hotel, Inc., in 1934 against a payment of $125 cash, were withdrawn from circulation, taken up on behalf of the debtor and discharged as an obligation, for the reason that such finding is unsupported by any evidence before the Board;

(2) in holding that the sum of $125 received by petitioner upon the surrender to Roosevelt Hotel, Inc., of $25,000
20 New York United Hotels, Inc., 6% debentures constituted an amount "received in exchange therefor," within the meaning of Section 117 (f) of the Revenue Act of 1934;

(3) in holding that the loss sustained by petitioner with respect to $25,000 New York United Hotels, Inc., 6% debentures did not constitute a bad debt ascertained to be worthless in the calendar year 1934 and as such deductible against petitioner's ordinary net income for that year within the meaning of Section 23 (k) of the Revenue Act of 1934; and

(4) in refusing to hold that there was no deficiency in tax due from petitioner for the year 1934.

Wherefore, petitioner respectfully asks that this Court review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same and direct the said Board to find that there is no deficiency in tax due from petitioner for the year 1934, and for the entry of such further orders and directions as may by this Court be deemed necessary and proper.

T. F. DAVIES HAINES,
Attorney for Petitioner.
T. F. Davies Haines,
63 Wall Street, New York City.

21 [*Duly sworn to by T. F. Davies Haines; jurat omitted in printing.*]

22 Before United States Board of Tax Appeals

[Title omitted.]

Notice of filing petition for review

Filed Aug. 9, 1939

To: COMMISSIONER OF INTERNAL REVENUE,
Internal Revenue Building, Washington, D. C.
J. P. WENCHEL, *Esq.*,
Attorney for Respondent,
Chief Counsel, Bureau of Internal Revenue,
Internal Revenue Building, Washington, D. C.

You are hereby notified that on August 9, 1939, a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above entitled cause, was filed with the Clerk of the Board. A copy of the petition as filed is attached hereto and served upon you.

Dated, August 9, 1939.

(Signed) T. F. DAVIES HAINES,
T. F. Davies Haines,
Attorney for Petitioner,
63 Wall Street, New York, N. Y.

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 9th day of August 1939.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Title omitted.]

Stipulation of facts

Certain facts pertinent to the issues involved in this proceeding are herein stipulated by the parties hereto through their respective attorneys with leave to either party to introduce other and additional evidence pertaining to the said issues.

1. The taxpayer is a resident of New York City and filed in his individual Federal income-tax return for the calendar year 1934 with the Collector of Internal Revenue for the Second District of New York.

2. The return as prepared and filed reflected gross income and deductions determined upon the cash receipts and disbursements basis.

3. The deficiency here involved arises by reason of the respondent's treatment of a transaction in 1934 involving bonds of the New York United Hotels, Incorporated, as an exchange, under the provisions of Section 117 (f) Revenue Act of 1934 and the loss sustained therefrom as a capital loss and therefore subject to the limitations imposed by that section. Petitioner denies the validity of the deficiency upon the grounds that the transaction resulted in a bad debt or an ordinary loss deductible in toto in the year 1934.

4. In May 1927, the petitioner purchased twenty-year 6-percent sinking-fund gold debentures of the New York United Hotels, Inc., maturing February 1, 1947, having a par value of $25,000.00,
24 at a cost of $24,750.00. A facsimile of one of these debentures is attached hereto, made a part hereof and designated Exhibit "A." The provisions of these debentures as contained in the indenture dated February 1, 1927, which also appear in these debentures, is attached hereto as Exhibit "A–1."

5. In 1931, the debtor corporation encountered financial difficulties and the debenture holders consented to a plan of readjustment whereby they waived the payment of a portion of the interest payable on the debentures. See Exhibit "B" describing the said plan which is attached hereto and made a part hereof in conjunction with Exhibit "A" showing the debenture holders' assent to this plan of readjustment.

6. On December 15, 1933, Ancillary receivers were appointed by the United States District Court for the Southern District of New York, and on the same date a plan of reorganization was submitted to the U. S. District Court for the Southern District of New York under the terms of which the assets of the debtor corporation were to be sold to a new corporation and the debenture holders were entitled to purchase for cash other debentures to be issued by the new cor-

poration upon stated terms and conditions. A certified copy of this plan is attached hereto, made a part hereof, and designated Exhibit C–1. A supplemental plan was submitted to the Court in February 1934, offering minor changes in the original plan (Exhibit C–2 hereto attached and made a part hereof) and on March 8, 1934, the Court entered its order approving the proposed plan of reorganization, but making no provision for debenture holders who had not participated in the plan of reorganization. Exhibit C–3 attached hereto and made a part hereof.

7. On May 22, 1934, the Court entered its final order in the reorganization proceedings wherein the receivers were directed, along with other matters, to pay to debenture holders who surrendered their debentures with all coupons attached before a fixed time, five dollars ($5.00) per each $1,000 par value. Upon the performance of the matters set forth in said order, the receivers were discharged. Exhibit D attached hereto and made a part hereof.

8. Shortly after May 26, 1934, the petitioner received written notice pursuant to the Court's order of May 22, 1934 (Exhibit D) stating in effect that the debtor corporation's assets had been sold and that he was entitled to receive five dollars per $1,000 face amount of debentures held by him upon surrender of his debentures with all interest coupons attached, by August 20, 1934, said payment to be "in full payment and settlement for said debentures." Said notice is attached hereto, made a part hereof and designated Exhibit E.

9. Pursuant to said notice, the petitioner on June 22, 1934, forwarded to the designated party his debentures of a face value of $25,000 bearing Serial Numbers M4–003–4027, inclusive, each of $1,000 par value and received a total payment of $125.00 in June 1934, representing five dollars per each $1,000 face value. Photostat of the letter of transmittal accompanying the debentures is attached hereto, made a part hereof and designated Exhibit F.

10. Losses from sales or exchanges of capital assets arising from transactions other than that involving the bonds of the New York United Hotels, Incorporated, have been allowed in the notice of deficiency dated October 6, 1937, from which this appeal is taken, in an amount of at least $2,000.00, plus gains from such sales or exchanges.

EDWARD I. SPROUL,
Counsel for Petitioner.

J. P. WENCHEL,
Chief Counsel for the Bureau of Internal Revenue,
Attorney for Respondent.

26 *Exhibit C-1 to stipulation of facts*

PLAN OF REORGANIZATION OF NEW YORK UNITED HOTELS, INC.

(THE ROOSEVELT)

Dated December 13, 1933

BURTON A. HOWE,
CHARLES DOHERTY,
JUNIUS R. JUDSON,
WILLIAM A. SMART,
Reorganization Committee.

COLONIAL TRUST COMPANY,
57 William Street, New York, N. Y., Depositary.

LOUIS A. BRUTY,
Secretary, Hotel Roosevelt,
45th Street at Madison Avenue, New York City, N. Y.

27 PLAN OF REORGANIZATION OF NEW YORK UNITED HOTELS, INC.

(THE ROOSEVELT)

PRESENT CAPITALIZATION

Twenty Year Six Per Cent. Sinking Fund Gold Debentures, due February 1, 1947; outstanding in the hands of the public, $5,113,500.00.

(There is excluded from the foregoing Debentures the face amount of $10,000 held in the treasury.)

Of the foregoing amount there has been deposited under the Plan of Readjustment, dated December 8, 1931, $4,551,500 and in addition, consents have been signed by the owners of $387,500 of the debentures which have not been actually deposited.

Preferred Stock—Seven Per Cent. Cumulative. Outstanding in the hands of the public 38,143½ shares of the par value of $100 each, or the sum of $3,814,350.00.

(This does not include 3,778½ shares held in the treasury.)

Dividends have accrued upon the foregoing Preferred stock amounting to the sum of $1,357,272.87, up to and including August 1, 1933.

Common Stock—64,710 shares of the par value of $64,710.00.

(The foregoing does not include 290 shares held in the treasury.)

28 GENERAL FACTS

The building known as The Roosevelt is constructed upon the land leased by the New York State Realty and Terminal Company, to New York United Hotels, Inc. (hereinafter termed the Corporation), which lease is dated August 1, 1922, and expires on September 1, 1943, and contains the option for two renewal terms, each of twenty-one years.

The New York State Realty and Terminal Company (hereinafter termed the Landlord), advanced toward the construction of the hotel building $3,000,000, which sum the Corporation agreed to repay as sinking fund rental under the terms of the lease. There has been paid as sinking fund rental upon account of the $3,000,000, the sum of $780,000, leaving the net amount unpaid upon such advance by the Landlord, the sum of $2,220,000 (of which sum payment of $150,000 was deferred, and payment of $300,000 is now in default.)

The lease from the Landlord to the Company required the Corporation to pay, in addition to taxes, water rents, etc., a ground rental of $23,333.33 per month, a building rental computed with reference to the interest on the unpaid balance of the $3,000,000 advanced, amounting at the present time to $12,950 per month, and on October 1st of each year a sinking-fund rental in reduction of the $3,000,000 advanced, amounting in each of the years 1931, 1932, 1933, and 1934 to $150,000 per year and for the year 1935 and for each of the subsequent years until the entire advance is repaid, $180,000 per year. Likewise the Corporation agreed to purchase its steam and electricity (when not generated by the Corporation) from the Landlord and pay monthly therefor.

On December 8, 1931, a Plan of Readjustment was promulgated by the Corporation, with the consent of the Landlord, which Plan of Readjustment provided generally as follows:

29 A—Debenture holders consenting thereto postponed the payment of the four interest coupons on their debentures, payable February 1, 1932, August 1, 1932, February 1, 1933, and August 1, 1933, until the maturity of the debentures, February 1, 1947; and

B—Accepted in lieu of the interest reserved upon the debentures, for the coupons due February 1, 1934, August 1, 1934, February 1, 1935, and August 1, 1935, one-half of the amount of the interest reserved in such coupons, and postponed payment of the remaining one-half of such interest until the maturity of the debentures, February 1, 1947; and

C—Waived the payment of that portion of the next five annual sinking fund installments applicable to the purchase of the debentures, and that portion of such sinking fund payments as represented the interest postponed as aforesaid;

D—In consideration of the consent by the debenture holders to the foregoing, the Corporation agreed that no dividends would be paid upon the Preferred or Common stock under certain restrictions; and

E—Agreed to compensate the holders of debentures agreeing to the Plan, by an income coupon not exceeding 2%, beginning with the calendar year 1936, and to create a Finance Committee representing the debenture holders and the Landlord, with veto power on all financial commitments.

Predicated upon such Plan of Readjustment, the Landlord agreed to postpone the payment of the $150,000 sinking fund rental due under the terms of the lease on October 1, 1931, so that one-tenth thereof should become due and payable October 1, 1934, and one-tenth thereof each year thereafter, and if the condition of the Company on October 1, 1932, should be such, all other obligations
30 under the lease having been provided for or paid, that the Corporation was not in sufficient funds to meet the sinking fund rental of $150,000, due on that date, to make a similar postponement; with like provisions with regard to the postponement of the sinking fund rental due on October 1, 1933.

Under the terms of such Plan of Readjustment, as hereinbefore set forth, $4,551,500 face value of debentures were duly deposited, stamped under the Plan, with the additional and changed coupons attached thereto, and in addition thereto, the holders of debentures of the face value of $387,500 consented in writing thereto, but have neglected to have their debentures stamped and new coupons attached thereto. Debenture holders who have either refused to assent or who have not been located and have not signified their assent or disapproval to the said Plan of Readjustment, own Debentures in the face amount of $174,500.

On October 1, 1932, the Corporation was unable to pay the Landlord the sinking fund rental of $150,000 then due, but was not entitled to an extension of the time of payment thereof by reason of the fact that it had been unable to comply with the other requirements of the said lease.

The Corporation is in default to the Landlord, for payments which have become due up to November 1, 1933, as follows:

Building Rental: Twenty-three months from December 1, 1931, up to and including November 1, 1933, at the rate of $12,950 per month, being 7% interest upon the balance unpaid upon the advance of $3,000,000, to wit—$2,220,000, or the sum of	$297,850.00
Ground Rent: Monthly ground rent from December 1, 1931, to November 1, 1933, at the monthly rental of $23,333.33 per month, twenty-three months	536,666.67
31 Steam and Electricity	22,985.22
Real Estate Taxes	$305,500.44
(On November 30, 1933, the further sum of $107,539.94 was payable on account of taxes, which the Corporation was unable to pay in full and the Landlord will probably be required to pay the same. The Landlord is entitled, under the terms of the lease, to interest upon the payments so made for the account of the Corporation.)	
Interest on Deferred Payments	42,497.07
Total due to the Landlord, as aforesaid	$1,205,449.40

In addition to the above indebtedness, the sum of $150,000.00 of sinking fund rental which became due on October 1, 1931, was deferred under the Plan of Readjustment above referred to. There is at present due and unpaid, sinking fund rental to the amount of $150,000.00 due October 1, 1932, and of $150,000.00 due October 1, 1933. The payment of said sum of $300,000.00, in case the Plan provided for herein is consummated, is to be made on or prior to the expiration of the first term of the lease.

The Roosevelt throughout its first few years of operation showed a satisfactory return. The earnings, after payment of taxes and the amounts due Landlord, but before depreciation, available for interest and sinking fund on the debentures, for the years 1928–1930, were as follows:

	Earnings
1928	$837,525.00
1929	978,161.00
1930	512,563.00

32 The Hotel has shown a deficit, after accruals for taxes, interest charges, and amounts due Landlord, but before depreciation, for the years 1931 and 1932 and the first ten months of 1933, as follows:

	Deficit
1931	$560,481.11
1932	993,568.92
1933 (Ten Months)	906,928.09

This drastic change in earning power seems to have resulted, not only from the depression, but from the large increase in hotel facilities in New York City.

These figures show conclusively that the Corporation cannot continue to function without a drastic reorganization. The Landlord for the past six months, by reason of the increasingly large sums due it, has been threatening to enforce its rights and take over the property, which action would exclude and make worthless the Debentures, Preferred and Common stock of the Corporation.

The security holders of the Corporation must bear in mind that there is a default, in the payment of rentals and taxes, aggregating in all as of November 1, 1933, $1,205,449.40 and that in addition sinking fund rentals in the amount of $300,000 are due and unpaid, and that the interest of the Corporation in the Hotel is predicated entirely upon its rights under the lease which said defaults give the Landlord the right to terminate.

The furniture, furnishings, and equipment of the Hotel belonging to the Corporation were pledged under the lease as security for the unpaid rent and the Landlord claims a lien thereon, which lien is in excess of the value of the furniture, furnishings, and equipment.

Drastic economies have been put into effect in operation, and the cost of operation, in the opinion of all concerned, has been for
33 many months at a minimum consistent with the proper operation of the Hotel. The Landlord, however, is unwilling to

permit the Corporation to continue in the defaults unless its capital structure is revised in such a manner as to permit the Corporation to carry on as a going concern and to take advantage of any recovery in general conditions, and the plan hereinafter referred to has been prepared with a view to meeting the requirement for such revision. The Plan is the result of numerous conferences between the representatives of the Landlord, the Corporation, and the Holders of securities of the Corporation. The Reorganization Committee provided for therein has undertaken the duties imposed upon them by the plan and the agreement with the thought that the plan and agreement give to the security Holders the best protection attainable, consistent with fairness to all concerned. The Committee and the Management of the Corporation are of the opinion that if this plan or some similar plan is not consummated, the security Holders will lose their entire investment; whereas, if this plan or a similar plan is consummated, the security Holders participating therein will have a reasonable chance of realizing a fair return on the new money invested and will save some part of their original investment depending, of course, upon the extent of the recovery in general business conditions, and the ability of the management to cope with the competition incident to the increased hotel facilities referred to above.

The Corporation also owes something under $50,000 to general merchandise creditors, and by reason of the Plan, when the same has been carried into effect, will probably have some additional creditors of a general nature, so that it seems advisable in this Plan to arrange for general creditors claims of approximately $100,000, subject to the exact facts as they materialize in the course of the carrying out of the Plan.

4 PLAN

A new corporation shall presently be formed under the laws of the State of Delaware or New York, as shall be determined by the Reorganization Committee, with the following capitalization:

Ten Year Six Per Cent Debentures: Authorized issue $1,500,000; to be dated on or about February 1, 1934; to bear interest at the rate of 6% per annum, when earned, in any year, payable annually, but to the extent unpaid to accumulate; callable at any time in whole or in part, at face amount and accumulated interest, plus interest at a like rate for the calendar year of call to the date of redemption; the Indenture securing the same to provide that no dividends shall be paid until Debentures are fully retired, and, further, that in each fiscal year the Board of Directors shall set aside surplus earnings beyond proper reserves for operation of the hotel, to be used to retire debentures or for the purchase thereof in the open market if the same can be purchased for less than the call price; to be issued only in registered form, without coupons. The debentures are to be secured by a chattel mortgage upon the furniture, equipment, and furnishings subject to the rights of the Landlord therein.

Preferred Stock: Authorized issue 26,500 shares; each share to be of the par value of $100; to be entitled to receive, but only after the debentures shall be fully retired, and all rental arrearages shall be fully paid, non-cumulative dividends at the rate of 6% per annum, in any year, when earned; to have no voting rights except such as provided by law; to be preferred as to dividends to the extent aforesaid, over the Common stock, and on any distribution of capital, after the debentures shall be retired, to be entitled to receive $100 per share and dividends at the rate of 6% per annum in the year of retirement, if earned, before any payment upon the Common stock.

Common Stock: Authorized issue 45,000 shares; each share to be of the par value of $5.00, and to be subject to the rights of the debentures and the Preferred stock; to have the entire voting rights of the Corporation, except as otherwise provided by law.

(The said new corporation will be hereinafter referred to as the New Company.)

In due course the Reorganization Committee will offer to purchase all of the assets of the Corporation, under the terms and conditions of this Plan, free and clear from all liens other than the rights of the Landlord under the lease, predicated upon the Landlord making a new lease with the New Company upon the terms and conditions hereinafter described under the heading "New Lease," or consenting to the assignment of the present lease, with modification thereof so that the present lease will conform to the terms and conditions of the lease provided for under the heading "New Lease." The Reorganization Committee reserves the right to determine as to how and in what manner the assets of the Corporation shall be acquired free and clear from all liens except as aforesaid, for the benefit of the New Company, under the Plan.

NEW LEASE.

In case the Plan be consummated, on or prior to March 1, 1934 or on or prior to such later date as may be approved by the Landlord the Landlord will either enter into a new lease with the New Company or consent to a transfer of the old lease to the New Company and a modification of the old lease, so that the resultant leasehold possessed by the New Company shall be changed from the existing leasehold in the following particulars:

(A) The Landlord will agree not to declare a default thereunder for non-payment of rentals during the period of three years from the date of the new lease or modification of the existing lease, as the case may be, in case during said period of three years the net earnings (as the same shall be defined therein) of the leased property up to the amount of the rentals reserved in the lease shall be paid to the Landlord as received and in case the Lessee shall also, during said period of three years, pay all operating expenses, including payment to the Landlord of taxes and service charges as they accrue and otherwise comply with the provisions of the lease;

(B) The Landlord will agree not to declare a default thereunder for non-payment of rentals during an additional period of two years beyond the period mentioned in Paragraph (A), in case during said additional period of two years the net earnings (as the same shall be defined therein) of the leased property up to the amount of the rentals reserved in the lease shall be paid to the Landlord as received, and in case the Lessee shall also, during said additional period of two years, pay all operating expenses, including payment to the Landlord of taxes and service charges as they accrue, and in addition thereto shall pay at least one-half of the Ground Rental and Building Rental reserved in the lease and otherwise comply with the provisions of the lease;

37 (C) Subsequent to the five-year period referred to in Paragraphs (A) and (B) above, all rentals provided for in the existing lease shall again become payable in full and the difference between the amount of rentals received by the Landlord during the said period of five years and the full amount of rentals reserved in the lease during said period, with interest, shall be paid to the Landlord as additional rental on or before the expiration of the first term of the lease in annual payments of substantially equal amounts;

(D) The indebtedness of the Lessee to the Lessor in the amount of $300,000.00 growing out of the nonpayment of the sinking fund rentals under the lease due October 1, 1932, and October 1, 1933, shall be paid to the Landlord as an additional rental on or prior to the expiration of the first term of the lease by annual payments of substantially equal amounts.

(E) During the period of five years referred to in Paragraphs (A) and (B) above and during such further period as any of the arrearages in rentals shall be unpaid, the Hotel shall be operated by a manager satisfactory to the Landlord, and his compensation and that of his staff shall be satisfactory to the Landlord, and the management, accounts, and expenditures relating to the Hotel shall at all times be subject to the approval of the Landlord;

(F) In case of default on the part of the Lessee under the new or modified lease as herein provided for, the Lessee upon written request of the Landlord and upon sixty days' previous written notice, shall assign the leasehold and any subleases, to the Landlord or a nominee of the Landlord, unless during such period of sixty days, such default shall be cured.

(G) The Landlord shall have a chattel mortgage upon the furniture, furnishings, and equipment as security for the payment of any arrearages in rentals.

38 WHEN PLAN DECLARED OPERATIVE

The Plan shall be declared operative when the following conditions shall have occurred:

A—When the Landlord shall have approved the same in writing and shall have executed the new lease to the New Company, or the modification of the old lease under the terms of the Plan; and

B—When the assets of the Corporation, free and clear from all liens, other than the rights of the Landlord under the lease, shall be assigned to the New Company, through the Reorganization Committee, by order of the proper court or courts, so that the New Company may commence operations.

VOTING TRUST

All of the Common stock of the New Company to be presently issued; shall be deposited under a voting trust agreement, for ten years, prepared by the Reorganization Committee in form satisfactory to the Landlord, which voting trust agreement shall provide for five Voting Trustees any of whom may be Directors of the New Company, and all of whom shall be initially selected by the Reorganization Committee, subject to the approval of the Landlord. The Voting Trust Agreement shall provide the method of selecting successor Voting Trustees. The Voting Trust Agreement shall further provide that when the Debentures of the New Company shall be entirely retired, the number of the Voting Trustees shall be reduced from five to three.

TREATMENT OF GENERAL CREDITORS OF THE CORPORATION

Each general creditor of the Corporation (the right being
39 reserved to pay such accounts as must be paid to continue operations) shall receive, upon due approval of his account by the Reorganization Committee or by a court of competent jurisdiction, a Voting Trust Certificate for one share of Common stock of the New Company for each $400 of indebtedness. Script will be issued for voting trust certificates for fractional shares.

TREATMENT OF INDEBTEDNESS DUE THE LANDLORD

As of November 1, 1933, the Landlord has an accrued account for defaults in payment of rentals under the terms and conditions of the leasehold of $1,205,449.40 in addition to the arrearages of $300,000.00 of sinking fund rental. It is deemed probable that the Landlord will be required to pay taxes due upon November 30th, 1933, of $107,539.94. To the extent of such indebtedness so accrued, to wit—$1,205,449.40 (excluding sinking fund rentals), and to the extent that the Landlord may be required to make an additional advance for the payment of said taxes, and to the extent of any additional rental arrearages (other than sinking fund rentals), said new Debentures of the New Company, on the consummation of the Plan, will be issued to the Landlord in face amount equal to the amount of such indebtedness, in satisfaction of such indebtedness. Accordingly, upon consummation of the Plan, there will be outstanding in the hands of the Landlord said Debentures of a face amount in excess of $1,300,000.

CASH REQUIREMENTS OF THE PLAN

The Landlord has required, as a condition of its agreement to the Plan, that the expenses of the Plan be not a charge upon the current earnings of the hotel. The Reorganization Committee has agreed to serve without charge. Nevertheless, a substantial sum is necessary in connection with the Plan, to meet printing bills, fees
40 due the State of incorporation of the New Company, fees of the Depositary under the Plan, fees of the Trustee under the Debenture issue, printing new Debentures, and Preferred and Common stocks, issuance tax due to the Federal Government upon such Debentures and stocks, fees of Receivers and Counsel, and other incidental expenses, which it is estimated will not exceed the sum of $70,000. All funds received from the sale of securities of the New Company will be used to defray these and other expenses of the plan.

TREATMENT OF DEBENTURES

Holders of Debentures of the Corporation will be entitled to purchase, for cash, Debentures of the New Company at par and accrued interest at the ratio of $10 face value of Debentures of the New Company for each $1,000 face value of Debentures of the Corporation surrendered (and proportionately for Debentures of the Corporation for lesser amounts). Upon the purchase and payment at par and accrued interest for such Debentures of the New Company, and the surrender of each $1,000 Debenture of the Corporation, the holder will receive, with each $10 face value of new Debentures, 5 shares of the Preferred stock of the New Company and a Voting Trust Certificate for 5 shares of Common stock of the New Company. Debenture holders of the Corporation who do not purchase Debentures in the New Company, will be entitled to receive, without payment therefor, upon surrender of each $1,000 Debenture of the Corporation, a Voting Trust Certificate for 2½ shares of the Common stock of the New Company.

TREATMENT OF PREFERRED STOCK

Likewise, each holder of 10 shares of Preferred stock of the
41 Corporation (and proportionately for lesser or greater amounts), who shall purchase from the New Company $5.00, face amount, of said new Debentures, at par and accrued interest, shall be entitled to receive, upon surrender of each 10 shares of Preferred stock of the Corporation held by him, Voting Trust Certificates for 5 shares of Common stock of the New Company. In the event that the said Preferred stockholders does not purchase such Debentures of the New Company, he shall have no participation under the Plan therein.

RESULTANT CAPITALIZATION OF NEW COMPANY

Assuming all of the Debenture holders and all of the Preferred stockholders of the Corporation accept the plan and purchase Debentures of the New Company as aforesaid, the resultant situation of the New Company would be as follows:

Debentures in the hands of the Landlord	$1,205,449.40
(This is subject to be increased by such amount as the Landlord may be compelled to pay toward the $107,539.94 taxes due November 30th, 1933, and additional rental arrearages.)	
Debentures in the hands of the present Debenture holders of the Corporation	51,113.00
Debentures in the hands of the present Preferred stockholders of the Corporation	19,071.00
Preferred stock outstanding in the hands of Debenture holders	25,567½ shares.
Common stock, all under Voting Trust:	
Voting Trust Certificates for Common stock outstanding, owned by Debenture holders of Corporation	25,567½ shares.
Owned by Preferred stockholders of Corporation	19,071¾ shares.
Owned by general creditors	200 shares.

42. RESERVATION BY REORGANIZATION COMMITTEE AS TO RIGHT TO ISSUE UNSUBSCRIBED SECURITIES

To the extent that the holders of the Debentures and of the Preferred Stock of the Corporation shall fail to subscribe for and purchase the new Debentures of the New Company, the Reorganization Committee reserves the right to issue such unsubscribed Debentures, together with the shares of Preferred Stock of the New Company and the Voting Trust Certificates representing shares of Common Stock of the New Company, which said Debenture holders and Preferred Stockholders of the Corporation would have been entitled to receive under the Plan had they subscribed for and purchased said new Debentures, to any other person, firm, corporation, or party who will subscribe for and purchase said new Debentures at the face value thereof; the subscription and purchase of the new Debentures in such case shall be without the surrender of the proportionate amount of Debentures and/or Preferred Stock of the Corporation which would otherwise have been surrendered if the Debenture holders and/or Preferred Stockholders of the Corporation had exercised their rights to subscribe for the said new Debentures under the Plan.

All financial and other representations and statements in this Plan are those of New York United Hotels, Inc., and while believed by the Committee to be accurate, are not representations by said Committee.

Dated New York, December 13, 1933.

BURTON A. HOWE,
CHARLES DOHERTY,
JUNIUS R. JUDSON,
WILLIAM A. SMART,
Reorganization Committee.

43 *Exhibit C–2 to stipulation of facts*

SUPPLEMENTAL OFFER OF ROOSEVELT HOTEL, INC.

The New Company referred to in the Plan and Agreement of Reorganization of New York United Hotels, Inc., dated December 13, 1933.

Loucks & Cullen, Counselors at Law, Equitable Building, 120 Broadway, New York City, N. Y.

In the Court of Chancery of the State of Delaware in and for New Castle County

FREDERICK W. ROCKWELL, COMPLAINANT

against

NEW YORK UNITED HOTELS, INC., A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, RESPONDENT

44 United States District Court for the Southern District of New York

In Equity No. E 77–68

FREDERICK W. ROCKWELL, PLAINTIFF

against

NEW YORK UNITED HOTELS, INC., DEFENDANT

To the Honorable ALFRED C. COXE, United States District Judge:

Supplementing the Offer made to the Receivers in the above-entitled causes, dated February 28, 1934, submitted to you on that date, to purchase the assets of New York United Hotels, Inc., under the Plan of Reorganization dated December 13, 1933, Roosevelt Hotel, Inc., hereby modifies the Offer so made as follows:

1. The Purchaser agrees to pay the said sum of Twenty-five Thousand Dollars ($25,000) contained in the original Offer, in addition to granting the participations to Debenture holders and Preferred stockholders of New York United Hotels, Inc., as set forth in the Plan and Agreement of Reorganization, and to continue such offer until April 1, 1934, or such further time as the Hon. Alfred C. Coxe shall determine, with the following specific modifications:

A—The Purchaser eliminates from the assets to be acquired the cash in the hands of the Receivers as of the close of business on February 28, 1934, and all accounts receivable of the Receivership, upon the understanding that the operations of the Receivers commencing with the opening of business upon March 1, 1934, shall be for the account of the Purchaser.

45 B—In arriving at this modification, the Purchaser understands the following:

(1) That the furniture, furnishings, facilities, and outfittings are subject to a chattel mortgage to New York State Realty and Terminal Company, in the sum, as of December 15, 1933, of $1,647,537.38. That the same have been appraised at forced sale value not to exceed $215,000, and a going value of approximately $900,000.

(2) That the leasehold in its present condition has been appraised as of no value.

(3) That the Receivers will pay from the cash retained and not sold to the Purchaser, all of their bills and contracts incurred by them, together with such sum as the Court shall determine eventually to be the reasonable value of use and occupancy during the Receivership up to March 1, 1934, together with such fees, allowances and expenses as shall be determined to be properly chargeable against the Receivership.

C—In addition to the aforesaid cash of $25,000, so to be paid for said assets, with the exception aforesaid, the Purchaser further states that in no way predicated upon the said Plan, but solely by reason of the fact that as a new company it will be compelled to do business with the individuals, firms, and companies that have been supplying food, beverages, and merchandise to New York United Hotels, Inc., and in order to obtain the lowest prices for its business; after it commences business, the Purchaser has decided that if this offer is accepted and the Plan is eventually consummated, it will assume as a matter of business discretion the amount of indebtedness due by New York United Hotels, Inc., to merchandise creditors for supplies furnished in the operation of the Hotel Roosevelt, amounting to $49,867.55, and the Purchaser will agree to pay the same.

ROOSEVELT HOTEL, INC.,
By WM. DEWEY LOUCKS and
ALFRED W. GRAY.

46 I, William J. Cullen, duly elected Assistant Secretary of Roosevelt Hotel, Inc., Do Hereby Certify that the following is a true and correct copy of a resolution adopted at the first meeting of the Board of Directors of said Corporation, duly called and held on the 21st day of February 1934, at which a quorum was present and acting thereat:

"Resolved, that discretionary powers be given unto Alfred W. Gray and Wm. Dewey Loucks, two members of this Board and associate counsel in connection with the Company, upon appearing at the proceedings so to be held before Hon. Alfred C. Coxe, to make such modification of such bid as presented by this Corporation as in their judgment shall seem necessary in order to carry into effect the said Plan and Agreement of Reorganization of New York United Hotels, Inc., dated December 13, 1933, subject only that said bid must be within the limitations of the requirements of said Plan."

In Witness Whereof, I have hereunto set my hand and duly affixed the seal of said Corporation, this 28th day of February, A. D. 1934.

WILLIAM J. CULLEN,
Assistant Secretary.

47 *Exhibit C–3 to stipulation of facts*

United States District Court, Southern District of New York
In Equity No. 77–68. Order Confirming Sale

FREDERICK W. ROCKWELL, PLAINTIFF

against

NEW YORK UNITED HOTELS, INC., DEFENDANT

This matter having come on to be heard on the 28th day of February 1934, the return day of the Order to Show Cause entered herein on February 7th, 1934, and George deB. Greene, one of the Receivers and Ancillary Receivers having appeared herein; and Graham, McMahon, Buell & Knox (Edward Ward McMahon of counsel) having appeared herein for Hugh M. Morris and George deB. Greene, the Ancillary Receivers in this jurisdiction and the Receivers in the State of Delaware; and Loucks & Cullen (William Dewey Loucks and William J. Cullen of counsel) having appeared herein for Burton A. Howe, Charles Doherty, Junius R. Judson and William A. Smart, the Reorganization Committee of New York United Hotels, Inc., and also for Roosevelt Hotel, Inc., the new Company referred to in the Plan of Reorganization, dated December 13th, 1933, and the purchaser herein; and Baldwin, Hutchins & Todd (Hiram C. Todd of counsel) having appeared herein for Frederick W. Rockwell, the plaintiff; and Alfred W. Gray having appeared herein for New York United Hotels, Inc., the defendant; and Olcott, Paul & Havens having appeared herein for Vera C. Kinneon, a noteholder; and Daniel F. Cohalan (Samuel Hoffman and George J. Langley of counsel) having appeared herein for William M. Holden, Arthur E. Campbell and Horatio W. Scott, Trustees of the Depositors'
48 Trust Fund of the People's National Bank of Barre, Vermont, and others, debenture holders; and Louis H. Strouse (by Archibald Palmer, of counsel) having appeared herein for certain creditors, and due proof having been filed of mailing on February 16th, 1934 of copies of said Order to Show Cause, dated February 7th, 1934, and of the Notice of Sale to each creditor and stockholder of the said New York United Hotels, Inc., defendant herein, whose name appeared on the lists of creditors and stockholders filed in this cause by said Receivers, together with due proof of the publication in the New York Evening Post on February 17th, 1934, of said Notice of Sale and of a Notice of Hearing on the approval of the Plan pursuant to the said Order to Show Cause, dated February 7th, 1934; and the Court having taken testimony as to the value of the prop-

erty to be sold, having received in evidence a Certificate of the Depositary under the Plan as to the number of creditors favoring the Plan, having received in evidence a report of the Ancillary Receivers, containing a statement as to the situation when they took charge, an account of the results of the operations under the receivership and their recommendations as to the fairness of the Plan, and George deB. Greene, one of the Receivers and Ancillary Receivers having testified as to the Plan and his recommendations thereon; and the Court having received in evidence the affidavits of Lester J. Lyon, dated February 28th, 1934 and George J. Donahue, dated February 28th, 1934 in opposition to the Plan; and having heard Samuel Hoffman, Archibald Palmer and George J. Langley in opposition to the Plan; and all persons interested in this cause and in the receivership estate including the defendant above named having been given an opportunity to be heard as to

"why an Order should not be granted adjudging that the Plan attached to and forming a part of the petition of the Reorganization Committee of New York United Hotels, Inc., dated February 7th, 1934 is fair and equitable and of advantage to all parties in
49 interest," and the Court having determined that the said Plan of Reorganization of New York United Hotels, Inc., dated December 13th, 1933, a copy of which is annexed to the petition of said Reorganization Committee of said New York United Hotels, Inc., is just, fair and equitable; and the said Order to Show Cause dated February 7th, 1934 having further provided that, in the event that said Plan shall be approved by this Court,

"all stockholders and creditors of New York United Hotels, Inc., are further directed to show cause at the same time and place why all of the property and assets of the New York United Hotels, Inc., and all assets which the Receiver and Ancillary Receivers have acquired or shall acquire, as the said assets may exist at the time of their transfer, should not be sold forthwith at public auction to the highest bidder by the Court upon the 'Terms of Sale' hereinafter set forth."

and the Court being of the opinion that the said Plan should be approved, and the Court having called for bids and Roosevelt Hotel, Inc., the new Company referred to in the Plan and Agreement of Reorganization of the New York United Hotels, Inc., dated December 13th, 1933, having duly qualified to bid for said property and having submitted its bid in writing and no other bid having been submitted, and the Court, having adjourned the sale until March 1st, 1934, at the same time and place and the Court upon such adjourned day, having reconsidered the Plan and having again heard Samuel Hoffman and George J. Langley in opposition thereto, and remaining of the opinion, after further considering the Plan and the objections thereto, that the said Plan was fair and equitable and of advantage to all parties in interest, and it appearing to the satisfac-

tion of the Court that the interests of all creditors and stockholders and other persons interested in the receivership estates of New
50 York United Hotels, Inc., would best be subserved by a sale of all of the assets of said New York United Hotels, Inc., and of the receivership estates thereof, and the said Roosevelt Hotel, Inc., the new Company referred to in the Plan and Agreement of Reorganization, dated December 13th, 1933, upon such adjourned date having submitted a Supplemental Offer herein, dated February 28th, 1934, and no other bid or Offer being submitted, and it appearing to the satisfaction of the Court, after hearing all parties in interest, that the acceptance of the said Offer of Roosevelt Hotel, Inc., dated February 28th, 1934, as modified by the aforesaid Supplemental Offer, dated February 28th, 1934, is proper and advisable, it is

Ordered, Adjudged, and Decreed that the Plan of Reorganization of New York United Hotels, Inc. (The Roosevelt), dated December 13th, 1933, a copy of which is annexed to the petition, dated February 7th, 1934, heretofore filed in this cause by the Reorganization Committee named in said Plan, is just, fair, and equitable and is hereby approved; and it is further

Ordered, Adjudged, and Decreed that all creditors and stockholders of the defendant and all other persons are forever barred from hereafter making objection or complaint to the said Plan of Reorganization; and it is further

Ordered, Adjudged, and Decreed that Hugh M. Morris and George deB. Greene, Ancillary Receivers of the above-named defendant corporation appointed by this Court be and they hereby are authorized and directed to cooperate with said Reorganization Committee and with the Delaware Receivers in consummating the said Plan of Reorganization and in carrying said Plan into effect; and it is further

Ordered, Adjudged, and Decreed that the Offer of Roosevelt
51 Hotel, Inc., the new Company referred to in the Plan and Agreement of Reorganization of New York United Hotels, Inc., dated December 13th, 1933, as modified by the Supplemental Offer of Roosevelt Hotel, Inc., dated February 28th, 1934, for the purchase of all of the property and assets of New York United Hotels, Inc., and all assets which the Receivers and Ancillary Receivers have acquired or shall acquire, as said assets may exist at the time of their transfer, except cash in the hands of the Receivers as of the close of business on February 28th, 1934, and all accounts receivable of the Receivers which accrued prior to March 1st, 1934, as the same are more particularly set forth and described in the Order to Show Cause, dated February 7th, 1934, be and the same hereby is approved and accepted and that Hugh M. Morris and George deB. Greene, the Ancillary Receivers herein, be and they hereby are directed to sell, convey, transfer, and assign all of the property and assets, *as the same are set forth in the said order to show cause dated Feb. 7, 1934*, and all assets which the Receivers

and Ancillary Receivers have acquired or shall acquire, as such assets may exist at the time of their transfer, except cash in the hands of the Receivers as of the close of business on February 28th, 1934, and all accounts receivable of the Receivers which accrued prior to March 1, 1934, ~~including, but not limited to, the property and assets mentioned and described in the said Order to Show Cause, dated February 7th, 1934,~~ to the purchaser, Roosevelt Hotel, Inc., its successors or assigns, upon compliance by Roosevelt Hotel, Inc., its successors or assigns, with all of the terms and conditions of its Offer, dated February 28th, 1934, as modified by its Supplemental Offer, dated February 28th, 1934, and of the Order to Show Cause, dated February 7th, 1934, and the "Terms of Sale" therein contained and of this Order; and it is further

Ordered, Adjudged, and Decreed that the property and assets sold hereunder shall be sold subject to and without prejudice to the
52 rights of the New York State Realty and Terminal Company, the New York and Harlem Railroad Company, the New York Central Railroad Company, and the Guaranty Trust Company of New York, as Trustees, as refefred to in the description of the property to be sold, contained in the said Order to Show Cause, dated February 7th, 1934, and subject to all the debts, contracts, and obligations incurred by the Ancillary Receivers appointed by this Court and by the Receivers appointed by the Court of Chancery of the State of Delaware, existing and unpaid at the time of the transfer of title to the purchaser, including all obligations assumed by said Receivers under contracts made by them and not yet fully performed by them, and for the purpose of securing the payment and full performance of all such debts, contracts, and obligations so incurred by the Ancillary Receivers appointed by this Court, this Court reserves a paramount lien and charge upon the property and assets sold hereunder. Upon the payment and full performance of such debts, contracts, and obligations, said Ancillary Receivers appointed by this Court shall make a report thereof to this Court and shall make an appropriate application for an order discharging said paramount lien. This Court reserves a further paramount lien and charge upon the property so to be sold to said Roosevelt Hotel, Inc., for the purpose of securing the complete consummation and carrying into effect of said Plan of Reorganization, dated December 13th, 1933. Upon said Plan being completely consummated and carried into effect, said Reorganization Committee shall make a report thereof to this Court and shall make an appropriate application to this Court for an order discharging said further paramount lien; and it is further

Ordered, Adjudged, and Decreed that upon payment to the Ancillary Receivers of the sum of Twenty-five Thousand Dollars ($25,000.00) and the creation and issuance of the securities called for in the said Plan, and upon delivery to the Purchaser, its suc-
53 cessors or assigns, of appropriate deeds of conveyance, and such other assignments, bills of sale, instruments of transfer,

and other assurances as may be appropriate to transfer the property sold to the purchaser, its successors or assigns, such purchaser, its successors or assigns, upon the production and delivery of such conveyances, assignments, bills of sale, instruments, instruments of transfer, and/or other assurances, or upon the production and delivery of certified copies thereof, shall be given possession of the property so sold, and such purchaser, its successors or assigns, shall, after such delivery of possession, hold, possess, and enjoy the same and every part and parcel thereof, free from all liens, claims, rights, interest, or equity of redemption of, in and to the same by or of the defendant, New York United Hotels, Inc., its successors and assigns, and by or of the creditors and stockholders of the said defendant, New York United Hotels, Inc., and by or of all persons claiming by, under, or through the defendant, its creditors or its stockholders, or by or of the receivers, and of all persons claiming by, through, or under them, or any of them, subject only, however, to the terms and conditions of the Order to Show Cause, dated February 7th, 1934, and the terms and conditions of the said Offer and Supplemental Offer and subject to compliance by the purchaser, its successors or assigns, respectively, with all terms and conditions on such purchaser imposed, respectively, by this decree and by the decree of confirmation of the Court of Chancery of the State of Delaware; and it is further

Ordered, Adjudged, and Decreed that the defendant, New York United Hotels, Inc., by its proper officers at the time of the execution of any deed or deeds or other instruments of conveyance, or transfer and assignment by the Receivers appointed by this Court, and by the Receivers appointed by the Chancery Court for the State of Delaware in and for the County of New Castle, for the prop-
54 erty sold, and by way of further assurance, deliver a similar deed or deeds or other instruments of conveyance, assignment, and transfer to the grantee or grantees in such deed or instrument and transfer, or, if any such purchaser or assignee shall so request, the said defendant shall join with the Receivers appointed by this Court, and with the Receivers appointed by the Chancery Court for the State of Delaware in and for the County of New Castle, in the execution of such deed or deeds or instruments of conveyance, assignment, and transfer so to be made by the said Receivers; and it is further

Ordered, Adjudged, and Decreed that the sale, as herein provided, of the said assets of the said defendant in this jurisdiction is conditioned upon the approval of such sale by the Court of Chancery in the State of Delaware in and for New Castle County and on the second Wednesday following the date of this Order, a report of the highest bid at this sale is to be made by the Delaware Receivers to the Court of Chancery of the State of Delaware, in and for the County of New Castle, at the County Courthouse at 11th and King Streets, Wilmington, Delaware, at 11 A. M., at which time and place,

said Court of Chancery of the State of Delaware will accept or reject said bid or make such decrees or orders as to it may seem just and proper and the purchaser shall not be deemed to have acquired any interest in the property sold hereunder until said purchaser's bid has been accepted by the Court of Chancery of the State of Delaware, in and for New Castle County; and it is further

Ordered, Adjudged, and Decreed that Roosevelt Hotel, Inc., the purchaser, be and it hereby is made a party to this proceeding and subjected to the jurisdiction of this Court and such jurisdiction is hereby retained over all parties in connection with the said offer of Roosevelt Hotel, Inc., and Supplemental Offer until such sale shall have been consummated and completed and all of the terms
55 and conditions of the Offer and Supplemental Offer for the purchase of the said assets have been fully and completely performed and the full consideration agreed to be paid and given in said Offer and Supplemental Offer shall have been fully paid and the terms and conditions of said Offer and Supplemental Offer and all obligations therein undertaken by Roosevelt Hotel, Inc., shall have been in all respects fully and completely performed; all such obligations shall survive the delivery of any and all instruments, transferring title either to the Roosevelt Hotel, Inc., its successors or assigns; and it is further

Ordered, Adjudged, and Decreed that the Ancillary Receivers, the Receivers, Reorganization Committee for New York United Hotels, Inc., and the Roosevelt Hotel, Inc., the Purchaser herein, may on not less than one day's notice apply to this Court at any time prior to the consummation of said sale and the carrying out of all of the obligations of said Offer and Supplemental Offer for such other relief at the foot of this decree as may be necessary or proper to conclude the purposes thereof.

Dated, New York, New York, March 8, 1934.

ALFRED C. COXE.

56 [Cover.] County Clerk's File No. E77-68. Year 193—. United States District Court, Southern District of New York. Frederick W. Rockwell, Plaintiff against New York United Hotels, Inc., Defendant. Order Confirming Sale. Loucks & Cullen, Attorneys for Reorganization Committee, Office and Post Office Address, Equitable Building, 120 Broadway, Borough of Manhattan, New York City. Stamped: (Filed Mar. 9, 1934. U. S. District Court, S. D. of N. Y.)

57 CERTIFICATES ATTACHED TO EXHIBITS C-1, C-2, C-3

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this Certificate have been compared with their

originals on file and remaining on record in this office; that they are correct transcripts therefrom and of the whole of said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at the City of New York in the Southern District of New York, this 19th day of September, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundred and sixty-third.

[SEAL] CHARLES WEISER, *Clerk.*

58 *Exhibit D to stipulation of facts*

United States District Court, Southern District of New York

In Equity 77–68

FREDERICK W. ROCKWELL, PLAINTIFF

against

NEW YORK UNITED HOTELS, INC., DEFENDANT

The Ancillary Receivers herein having filed their final accounts in the office of the Clerk of this Court on the 1st day of May 1934, and Graham, McMahon, Buell & Knox, solicitors for said Ancillary Receivers, having filed in the office of the Clerk of this Court on the same date their petition for an allowance for service as such solicitors for the Ancillary Receivers in the amount of $10,000.00, and Baldwin, Hutchins & Todd, solicitors for the Complainant, having filed their petition for an allowance as such solicitors in the office of the Clerk of this Court on the same date in the amount of $5,000.00, and Edwin D. Steele, solicitor for the Receivers, appointed by the Court of Chancery in the State of Delaware, in and for New Castle County, having filed his petition in the office of the Clerk of this Court on the same date, for an allowance as such solicitor for the Receivers in the amount of $5,000.00 and consented that this Court fix the amount thereof, and Hugh M. Morris and George deB. Greene, Receivers in the State of Delaware, in and for the County of New Castle, having filed their applications asking that their compensation as such Receivers be fixed by this Court and due notice that the said applications would be brought before this Court on the 8th day of May 1934 at 4:30 o'clock in the afternoon, having been served upon each creditor and stockholder of the said New York United Hotels,
59 Inc., and upon all the parties who have appeared in this proceeding, and the said matters having come on to be heard on the 8th day of May 1934, the return day of said notice, at the time and place therein stated, and George deB. Greene, one of the Receivers and Ancillary Receiver having appeared herein; and Graham, McMahon, Buell & Knox (Edward Ward McMahon of Counsel)

having appeared herein for Hugh M. Morris and George deB. Greene, the Ancillary Receivers in this jurisdiction and the Receivers in the State of Delaware; and Loucks & Cullen (William Dewey Loucks and William J. Cullen of Counsel) having appeared herein for Burton A. Howe, Charles Doherty, Junius R. Judson, and William A. Smart, the Reorganization Committee of New York United Hotels, Inc., and also for Roosevelt Hotel, Inc., the purchaser herein; and Baldwin, Hutchins & Todd (Hiram C. Todd of Counsel) having appeared herein for Frederick W. Rockwell, the plaintiff; and Alfred W. Gray having appeared herein for New York United Hotels, Inc., the defendant; and Daniel F. Cohalan (Samuel Hoffman of Counsel) having appeared herein for George Donahue and other creditors; and Edwin D. Steele having appeared herein for George deB. Greene and Hugh M. Morris as solicitor for the Receivers, appointed by the Court of Chancery in the State of Delaware, in and for New Castle County, and due proof having been filed of mailing on May 1st, 1934, of copies of the Notice of Motion herein, dated May 1st, 1934, to each creditor and stockholder of the said New York United Hotels, Inc., defendant herein, whose name appeared on the lists of creditors and stockholders filed in this Court by said Receivers, together with proof of service of said Notice of Motion on all counsel who have appeared in the proceeding; and the Court having taken proof as to the Receivers' accounts and having received in evidence a general release from the purchaser, Roosevelt Hotel, Inc., to the Receivers, covering the operation of said hotel for the account of the purchaser
60 after March 1st, 1934, and the Court having received the affidavit of George J. Donahue, verified the 3rd day of May 1934, and the Receivers' final accounts having been filed in Court, and all persons interested in this cause and in the receivership, including the defendant above named, having been given an opportunity to be heard, and after having examined the accounts as filed as to any objections thereto, and there being no objection to the accounts or any statement appearing therein, and the Court having considered the application of Graham, McMahon, Buell & Knox as solicitors for the Receivers herein, for an allowance for their services, and having before it the application of Baldwin, Hutchins & Todd, solicitors for the Complainant, and their application for allowance for their services, and Edwin D. Steele as attorney for the Receivers in Delaware, having consented that this Court fix his allowance for services rendered in that proceeding, and the Court having the application of said Edwin D. Steele before it for consideration, and all parties having an opportunity to be heard thereon, and the Court having before it an application of the Receivers to fix the amount of the value of the use and occupation of the premises of the Roosevelt Hotel during the term of the receivership from December 15, 1933, to March 1, 1934, and the Court having before it for consideration the determination of a disposition of the balance in the hands of the Receivers, as shown by the Receivers' accounts amounting to $89,-

278.61 in cash, and accounts receivable in the amount of $8,352.00, having an estimated present value of $4,190.67; and the Court, after hearing all parties in interest, having filed its Memorandum of Opinion dated May 11, 1934, it is

Ordered, Adjudged, and Decreed, that the final accounts of Hugh M. Morris and George deB. Greene, Ancillary Receivers of New York United Hotels, Inc., appointed by this Court, which said accounts are on file in the office of the Clerk of this Court, be and the same hereby are approved; and it is further

61 Ordered, Adjudged, and Decreed that the following allowances are made to the Receivers and Counsel in this proceeding, to be paid by the Receivers out of the funds in their hands, in full for services rendered in this proceeding:

To George deB. Greene: for services as Receiver in Delaware	$500.00
For services as Ancillary Receiver in New York	4,500.00
To Hugh M. Morris: for services as Receiver in Delaware	500.00
For service as Ancillary Receiver in New York	3,000.00

To Messrs. Graham, McMahon, Buell & Knox:

In full for services and disbursements as solicitors and counsel for the Ancillary Receivers herein	10,000.00

To Messrs. Baldwin, Hutchins & Todd:

In full for services and disbursements a solicitors for the plaintiff herein	5,000.00
To Edwin D. Steele: in full for services as solicitor and counsel for the Receivers in Delaware	3,500.00

and it is further

Ordered, Adjudged, and Decreed, that the Ancillary Receivers herein pay over the remaining balance in their hands (after the payment of the foregoing allowances) amounting to $62,278.61 to the New York State Realty & Terminal Company, Landlord of the premises known as the Roosevelt Hotel, and that the said Ancillary Receivers assign, transfer, and set over the accounts receivable of said Receivers amounting to $8,352.00 to the said New York

62 State Realty & Terminal Company, the landlord of the premises herein, in full payment and satisfaction for use and occupation of the premises known as the Roosevelt Hotel, for the period of the receivership from December 15, 1933, to March 1, 1934, on condition that the said New York State Realty & Terminal Company within five days after the date of this order, file in the office of the Clerk of this Court, its written consent to pay out of said funds to the Roosevelt Hotel, Inc., to be disbursed by said Company, as hereinafter provided, such amount as will be sufficient to pay to the State of New York the sum of $534.61 in full for franchise taxes of New York United Hotels, Inc., for the year commencing November 1st, 1933, and to pay to the State of Delaware the sum of $150.00 in full for franchise taxes of New York United Hotels, Inc., and further, to pay to each Debenture holder and creditor of New York United Hotels, Inc. (other than merchandise creditors whose claims have already been assumed by the purchaser of the property

herein), a sum equal to $5.00 on each $1,000 Debenture and at the same rate on all Debentures of a lesser amount, and at the same rate on all allowed claims of other creditors of New York United Hotels, Inc., excepting merchandise creditors whose claims have already been assumed by the purchaser; such payments to be made provided within ninety days from the date of this order such payments shall be accepted in full satisfaction of such Debentures and/or claims, and upon surrender of said Debentures, with all unpaid coupons attached, and transfer of said claims, respectively, at the office of Roosevelt Hotel, Inc., Madison Avenue and 45th Street, in the City of New York, N. Y., against payment as hereinbefore directed; and it is further

Ordered, Adjudged, and Decreed that upon the payment by the said Receivers of the sums herein directed, and in the manner provided herein, that the said Receivers be and they hereby are discharged as Ancillary Receivers herein, and their bond given herein as such Ancillary Receivers cancelled.

Dated New York, N. Y., May 22, 1934.

ALFRED C. COXE.

63 "EXHIBIT D" COVER

In Equity 77-68. United States District Court, Southern District of New York. Frederick W. Rockwell, Plaintiff, vs. New York United Hotels, Inc., Defendant. Order with Notice of Settlement. Copy Received this 18th Day of May 1934. Baldwin, Hutchins & Todd (Baldwin, H. & T.) Solicitors for Plaintiff. Loucks & Cullen (Loucks & C.) Solicitors for Reorganization Committee. Olcott, Paul & Havens (Olcott P. & H.) Solicitors for Vira C. Kineoh. Daniel F. Cohalan (D. F. Cohalan) Solicitor for Trustee for Bondholders. L. H. Strouse (L. Strouse) Attorney for Petitioning creditors. Harry Sammet (H. Sammet) Attorney for Lester Lyons. Archibald Palmer (A. Palmer) of counsel to Intervening Creditor.
64 George Pheil (G. Pheil) Attorney for Frank Wahlberg, Intervening Creditor. Alan Emil (A. D. Emil) Attorney for Petitioning Creditors. Larkin, Rathbone & Perry (Larkin R. & P.), Solicitors for Central Union Trust Company, Trustees. Clive L. Handy (C. L. Handy) Attorney for New York State Realty & Terminal Company. Alfred W. Gray (A. W. Gray) Attorney for Defendant, New York United Hotels, Inc. John J. Bennett, Jr. (J. J. Bennett), Attorney General for the State of New York. AWJ. Graham, McMahon, Buell & Knox, One Cedar Street, New York.

65 CERTIFICATE ATTACHED TO EXHIBIT D

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this Certificate have been compared with their

originals on file and remaining on record in this office; that they are correct transcriptions therefrom and of the whole of said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at the City of New York in the Southern District of New York, this 23rd day of September in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundred and sixty-third.

[SEAL] CHARLES WEISER, *Clerk.*

66 *Exhibit E to stipulation of facts*

ROOSEVELT HOTEL INC.

THE ROOSEVELT

MADISON AVENUE AT 45TH STREET

NEW YORK, N. Y.

To the Holders of Twenty-Year Six Per Cent Sinking Fund Gold Debentures of New York United Hotels, Inc.; Due February 1, 1947:

The Receivers of New York United Hotels, Inc., have been discharged, and the assets of New York United Hotels, Inc., have been sold. Under the final order of the United States District Court for the Southern District of New York, the balance of the cash in the hands of the Receivers, amounting to the sum of $62,278.61, together with Accounts Receivable, good and bad, of the face amount of $8,352 was awarded to the Landlord for use and occupancy during the Receivership, and as part of the Receivership expenses, conditioned upon the Landlord making available therefrom a payment of $5.00 per $1,000 face amount of Debentures unto the holders of Debenture, and further provided said Debentures were surrendered with all unpaid coupons attached, on or before August 20th, 1934, in exchange for such cash.

You are therefore advised that the Landlord has made available the necessary amount of cash to Roosevelt Hotel, Inc., for such Debenture holders as care to take advantage of this provision made by the court.

Debentures heretofore deposited under the Plan and Agree-
67 ment of Reorganization of New York United Hotels, Inc., are not available to the original holder thereof for this purpose. Other Debenture holders are therefore invited to forward their Debentures, with all unpaid coupons attached, on or before August 20th, 1934, to Roosevelt Hotel, Inc., Madison Avenue and 45th Street, Borough of Manhattan, New York City, N. Y., and forthwith upon receipt thereof, with the enclosed letter of transmittal, duly executed, New York funds will be sent to such holders, at the rate of $5.00

per $1,000 face value of such Debentures, and proportionately for lesser amounts.

The time having been fixed by the Court will not be extended. The payment so made will be in full payment and settlement for said Debentures.

ROOSEVELT HOTEL, INC.,
By LOUIS A. BRUTY, *Treasurer.*

Dated New York, N. Y., May 26th, 1934.

68 *Exhibit F to stipulation of facts*

To ROOSEVELT HOTEL, INC.;
Madison Avenue at 45th Street, New York City, N. Y.

Enclosed herewith find $25,000.00 face amount of the Twenty-Year Six Per Cent Sinking Fund Gold Debentures, due February 1, 1947, of New York United Hotels, Inc., with all unpaid coupons attached, numbered M-4003/27, which are hereby surrendered by the undersigned, the owner thereof, under the terms of the order of the United States District Court for the Southern District of New York, to enable the undersigned to receive from the funds made available under such order, in full settlement of said Debentures, the ownership of which is hereby surrendered, $5.00 per $1,000 face amount of said Debentures, and proportionately for less than $1,000 thereof. The said sum of money representing the settlement for said Debentures is to be sent to me at the address below my name.

SAMUEL C. THOMSON,
(Signed) Samuel C. Thomson,
Owner and holder of the foregoing Debentures.

(Print address) Address % Customers Securities Dept., The New York Trust Co., 100 Broadway, New York.
Dated June 22, 1934.

69 Before United States Board of Tax Appeals

[Title omitted.]

Praecipe for transcript of record

Filed ug. 12, 1939

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit heretofore filed by the above-named petitioners:

1. Docket entries of the proceedings before the Board.

2. Petition filed on November 13, 1937.
3. Answer filed on December 14, 1937.
4. Findings of fact and opinion of the Board promulgated on June 7, 1939.
5. Order entered on June 14, 1939.
6. Petition for review filed on August 9, 1939.
7. Notice of filing petition for review filed on August 9, 1939.

70 8. Stipulation of facts filed at hearing on November 28, 1938, including the following exhibits: Exhibit C1, C2, C3, D, E and F; and omitting Exhibits A, A1 and B.

9. This Praecipe for Record with admission of service thereof.

Said transcript to be prepared as required by law and the Rules of the United States Circuit Court of Appeals for the Second Circuit.

(Signed) T. F. DAVIES HAINES,
Attorney for Petitioner,
T. F. Davies Haines,
63 Wall Street, New York City.

Service of a copy of this Praecipe is hereby admitted this 12th day of August 1939.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Internal Revenue Building, Washington, D. C.

71 [Clerk's certificate to foregoing transcript omitted in printing.]

72 In United States Circuit Court of Appeals for the Second Circuit

No 131—October Term, 1939

(Argued November 22, 1939. Decided January 8, 1940)

S. C. THOMSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the Board of Tax Appeals

Petition by S. C. Thomson to review a decision of the Board of Tax Appeals, redetermining a deficiency in income tax for 1934.

Reversed.

Before L. HAND, CHASE, and PATTERSON, Circuit Judges.

Appleton, Rice & Perrin (Lee J. Perrin, Clifton S. Thomson, and T. F. Davis Haines, of counsel), for petitioner. Samuel O. Clark, Sewall Key, and Helen R. Carloss, for respondent.

73 *Opinion*

PATTERSON, Circuit Judge:

In his income-tax return for 1934 the petitioner claimed a deduction of $24,625 for a bad debt. The commissioner disallowed the deduction and determined a deficiency in tax. The Board of Tax Appeals sustained the commissioner.

The petitioner in 1927 purchased $25,000 face amount of debentures of New York United Hotels, Inc., paying $24,750 for them. The debentures were part of an issue of $5,300,000. The issuing company in 1931 ran into difficulties and obtained concessions from debenture holders in postponement of interest payments and waiver of sinking fund requirements. The situation became much worse later, and in December 1933 receivers were appointed by the district court on creditor's bill. In the plan of reorganization approved by the district court in March 1934, no provision was made for debenture holders who declined to put in new money. In the final decree of May 22, 1934, however, the receivers were directed to pay $5 in full settlement for each $1,000 debenture surrendered by debenture holders for cancellation. The petitioner in June 1934 took advantage of this provision and surrendered his $25,000 debentures, receiving $125 in cash. This was a loss of $24,625, and the petitioner claimed in his 1934 return a deduction of this amount as a bad debt.

The case then is one where the debentures proved on insolvency of the debtor company to be almost completely worthless. The petitioner, who had paid $24,750 for them, realized $125 on them when he turned them in to the receivers for cancellation. The Revenue Act of 1934, by express provision in section 23 (k), permitted the deduction of the unrecoverable part of debts partially worthless. The applicable regulations, Regulation 86, article 23 (k), mentioned

74 as examples of bad debts the difference between the amount received on distribution of the assets of a bankrupt debtor and the amount of the claim, and the difference between the amount received by a creditor of a decedent on distribution of the estate and the amount of the claim. The example of a debt rendered partially worthless by bankruptcy of the debtor virtually covers the present case. But the Board took the view that the case was one of "retirement" of the debentures within section 117 (f) of the 1934 Act and so was an instance of a capital loss rather than of a bad debt. If the transaction was a capital loss, the petitioner, for reasons that require no discussion, was not entitled to deduct the loss from income.

Section 117 dealt with capital gains and losses. It provided that percentages of the gain or loss on sale or exchange of a capital asset should be taken into account in computing net income, and it imposed limitations on the allowance of losses from sales or exchanges. Subsection (f), a new provision in income tax acts, read:

"For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes or certificates or other

evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor."

We are of opinion that what happened here may not fairly be taken as a "retirement" of the petitioner's debentures. Dictionary definitions of "retire" are "to pay up and withdraw from circulation," "to withdraw from circulation or from the market," "to take up or pay." The word signifies some voluntary action on the debtor's part in fulfillment of his promise to pay. A man as sanguine as Micawber might describe his bankruptcy as a "retirement" of his obligations, but a merchant seeking credit who spoke in such euphemisms might find himself in trouble later. Where creditors receive a petty dividend (one-half of one percent in this case) on the collapse of their debtor, their claims may be extinguished but are hardly "retired." The Board was in error in treating the case as one of "retirement" of the petitioner's debentures.

The case was one of bad debt. To support a deduction for bad debt in a particular year, however, the taxpayer must show that the debt was ascertained to be worthless in that year and that he charged it off in that year. Spring City Co. v. Commissioner, 292 U. S. 182. While the facts here would support findings that the petitioner ascertained the debt to be worthless in 1934 and that he charged it off in that year, the Board made no findings on these issues. We have no power to supply findings. Helvering v. Rankin, 295 U. S. 123. Under such circumstances the case will be remanded to the Board for further findings.

Reversed.

In United States Circuit Court of Appeals, Second Circuit.

S. C. THOMSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal From the United States Board of Tax Appeals

Judgment

Filed Jan. 25, 1940

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is reversed, and cause remanded.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

77 [File endorsement omitted.]

78 [Clerk's certificate to foregoing transcript omitted in printing.]

79 Supreme Court of the United States

Order allowing certiorari

Filed May 20, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 914.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 44353. U. S. Circuit Court of Appeals, Second Circuit. Term No. 58. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. S. C. Thomson. Petition for a writ of certiorari and exhibit thereto. Filed April 25, 1940. Term No. 58 O. T. 1940.

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